SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 925 [illegible] 65

THE UNITED STATES OF AMERICA
Petitioner,

vs.

WADDILL, HOLLAND & FLINN, INC., ET AL.

BRIEF FOR CITY OF DANVILLE (VIRGINIA) OPPOSING PETITION FOR WRIT OF CERTIORARI

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City of Danville, a municipal corporation of the Commonwealth of Virginia, prays that application for a writ of certiorari be denied.

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is officially reported, 182 Va. 351, ... S. E. .....

THEORY OF CITY

The theory of the City is that, under the Constitution, Virginia Statutes, City Charter and Ordinances, annual levies assessed on real estate and tangible personal property located within said City constitute a lien which becomes effective as of January 1 in each year. It is also contended this lien has priority over all other liens, including mortgages, deeds of trust, chattel mortgages and conditional sales contracts, even though such liens were created prior to the beginning of the assessment year. The lien is created by virtue of the assessment against the specific chattels and the levy of the tax on the property.

It is also claimed that no distraint is necessary to perfect the lien; the only object of a distraint for taxes being to enforce the lien by a sale of the property subject thereto.

The total tax bill due the City was $300.55. The State Courts allowed priority as to $222.31 of the claim, as against both the landlord's lien and the debt of the United States. The priority applies only to specific taxes assessed against tangible personal property of Roman's Restaurant consisting "of its furniture and equipment".

No priority was allowed for that portion of the tax bill due the City on merchant's capital, as the tax liability therefor did not arise by the listing and assessment of tangible personal property. A lien for such taxes against specific property must be acquired by distraint or other legal process.

FACTS

The trustee under the deed of assignment took possession of the furniture and equipment located in Roman's Restaurant, 510 Main Street, Danville, Virginia, along with the other assets of the assignor, on June 19, 1941 and sold the property at auction on July 12, 1941. The chattels were not removed from the premises before the auction sale and levy for all City taxes was made on July 2, 1941, (R. 25). The opinion of the learned Judge of the Corporation Court of Danville appears (R. 26-34). The learned Judge decided that the City has a paramount lien for taxes.

> "My conclusion is that as to $222.31 of its claim the City of Danville has priority over both the landlord's lien and that of the United States. That is the amount assessed against 'Roman's Restaurant' on its 'furniture and equipment', less the tax assessed on its 'Merchant's Capital, which was $1.50 for each of the three years in question. Section 5524 subordinates the landlord's lien to the lien of taxes. A tax assessed against a specific chattels is a permanent lien thereon and follows it wherever it may be. *Chambers* v. *Higgins*, 169 Va. 345; *Baugh & Sons* v. *Dreary*, 150 Va. 334. The concrete question then is this: were the taxes assessed against the 'Furniture and Equipment' of 'Roman's Restaurant', '510 Main Street' assessed against a 'specific chattel' or chattels. My search has lead me to no authority on the subject, but

"I think there is an analogue to be found in cases dealing with the sufficiency of the description of property conveyed by chattel mortgages. See *Williamson* v. *Payne*, 103 Va. 551. Following that analogy the City would have a specific and perfected lien. The furniture and equipment assessed for taxation had a definite situs and was used in the conduct of a specific business, and I think that it should be regarded as a unit as far as the assessment is concerned. So long as they remained on the premises where the owner's business was conducted, I think they fell within the fair intendment of the Virginia Statutes discussed in the cases last cited. Had they been divided and removed therefrom no doubt different results would have followed. The City's charter gives it the same rights to a lien for taxes as are given the Commonwealth in its Tax Code. See City Charter, Chapter 9, Sec. 1." (R. 33-34).

The Charter provision referred to is copied in the Appendix to this brief. P. 11.

VIRGINIA STATUTES

In Virginia the State Constitution prohibits the State itself from imposing any property tax for State purposes on real estate or tangible personal property, except rolling stock of public service corporations. Both real estate and tangible personal property, with

the exception noted, are expressly segregated for, and made subject to, local taxation only. Virginia Constitution §171. Tangible personal property segregated for local taxation only is classified by State Statute. §283 State Tax Code. (See A._____).

Every taxpayer, owning property subject to local taxation, is required by Statute to return such property as of January 1 of each year to the local Commissioner of the Revenue on forms prescribed by the State Department of Taxation. Such returns must be filed on or before June 1 of each year and such property is returnable for taxation as of January 1 preceding. The status of all taxpayers liable for local taxes and levies on his property is fixed, as of January 1 each year, and the value of all such property is taken as of that date. §280, State Tax Code. (See A._____)

By Section 293 of the Tax Code annual levies are ordered made by the council of every city "upon any property therein subject to local taxation and not expressly segregated to the State for the purposes of State taxation only." This levy upon property therein subject to local taxation, and not expressly segregated to the State for purposes of State taxation only, completes the assessment and liens the specific property assessed. (See A._____)

By Section 317 of the Tax Code provision is made for the form of a personal property book to be prescribed by the State Department of Taxation and to be furnished each commissioner of the revenue. (See A._____)

This Section further provides that upon this per-

sonal property book shall be entered the name of the property owner and assessments made against him of all taxable, tangible and intangible personal property and other subjects of taxation not required to be assessed on some other book or form.

Section 378 of the Tax Code provides:

> "Any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable, or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon." (See A. .....)

This statute gives the right of distress against a person's goods or chattels for his tax liability both as to taxes actually assessed on the particular property and as to his general tax liability. However, as to property on which taxes are assessed, the right of distraint makes the goods liable in the hands of any person for taxes assessed thereon. The lien is good even as against a purchaser for value.

Section 5524 of the Virginia Code, copied in Petition for writ (A. 15), expressly recognizes that a "lien for taxes, levies, or militia fines" has priority over the landlord's lien for rent.

ARGUMENT

It is contended for the City of Danville that as to assessments of taxes made by the commissioner of revenue on specific items of tangible personal property pursuant to annual levies made by the City Council a lien attaches on such specific personal property by operation of law from January first of each year and that this lien has priority over any existing liens by deed of trust or otherwise.

Inasmuch as this lien attached as of January first and the debt of the United States was not acquired by it until after that date the tax lien has priority.

The assessment of local taxes against real estate and tangible personal property is effected by quasi-judicial acts which require (1) the determination, by the commissioner of the revenue, of the assessed value of the property, (2) the levy of the tax thereon at the rate prescribed for each $100.00 of value. This determines the amount of tax liability. These steps result in the assessment.

There seems to be a substantial distinction, however, between the right to lien property by judicial process for a contractual or general tax liability and an actual tax lien created by an assessment against the property itself. Of course a judicial proceeding to acquire lien for a general tax liability is a proceeding *in personam*. The lien results from the judicial proceeding, whereas a proceeding to enforce an actual lien against property is one *in rem*. Therefore, an actual specific lien on the *res* must be distinguished from the right to acquire a lien under judicial process based upon a personal judgment against the person liable. A proceeding to

enforce a lien does not require the rendition of a personal judgment against the defendant but may be enforced by an *ex parte* proceeding *in rem*.

In *United States v. Texas*, 314 U. S. 48, 86 L. ed. 35[illegible], the Texas statute declared that all gasoline taxes due by any distributor to the State "shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor. . . ." That lien was described as an inchoate and general lien as distinguished from a specific and perfected lien. To have perfected such a lien would have required a judicial proceeding *in personam* because the fact of ownership of the property on which the lien was sought to be established had to be determined as well as the amount of tax liability and some judicial process had to issue against the person liable.

That situation is readily distinguishable from a specific property tax actually levied and assessed against the land or tangible personal property listed on the assessment rolls.

If the State Courts determine that under local law a lien has been created by contract or statute against specific property, real or personal, and that this lien is enforceable by a proceeding *in rem* as distinguished by a proceeding *in personam*, surely there can be no question that under R. S. 3466 the United States would not be entitled to priority on its general claim for debt which is not supported by a specific lien on the *res*.

It is stated that at common law there could be no lien without possession but that this was not so in maritime law or in equity.

Peck v. *Jenness*, 7 How. 612.

Statutory liens without possession have the same efficacy as common law liens with possession.

Beall v. *White*, 94 U. S. 382, 24 L. ed. 173.

Priority of lien gives priority of legal right.

Hazard v. *Milwaukee, etc., Company*, 101 U. S. 837, 25 L. ed. 1081.

It is the very nature and essence of a lien that no matter into whose hands the property goes it passes *cum onere*.

Burton v. *Smith*, 13 Pet. 464.

The writ of distress is an extra-judicial remedy, and consists of the act of taking movable property out of the possession of the owner to compel the performance of an obligation. The lien is not created by distraint. Usually property is distrained by process issued by a justice upon application of the tax collector. The purpose of this writ is to take possession of the property, to make sale thereof and make return of the writ showing to what extent the distress is satisfied by a sale of the property. It is a proceeding *in rem* against the property as distinguished from a proceeding *in personam* against the owner.

Whether liens are specific and have attached to the *res* is a State question and not a Federal question and should be controlled by the decisions of the State courts.

Spokane County v. *United States*, 279 U. S. 80-95, 73 L. ed. 621-626.

REVISED STATUTE 3466; 31 U.S.C.A. 191

This Statute does not create any lien in favor of the United States. Its original purpose was to provide more effectually for the settlement of accounts between the United States and receivers of public money, and to give debts due the United States a preference over other debts due general creditors by receivers of public money. It has been extended by construction to protect the United States in the collection of debts due it even as against the claims of a State which had priority under State law. The Statute has also been construed to give the United States priority even as against liens created under State law in cases where it is considered that the lien is inchoate and not specific because some judicial process is necessary to enforce the lien.

While under the Statute the United States is entitled to have debts due it satisfied before distribution is made to general creditors of an insolvent's estate, it is submitted that Congress never intended and is without constitutional power to deprive a lien holder of his property right in the lien by giving debts due the United States priority over such liens in the distribution of an insolvent's estate. It is therefore urged that the application for the writ should be denied.

Respectfully submitted,

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APPENDIX

CHARTER OF THE CITY OF DANVILLE, Chapter 9:

Sec. 4. Lien for taxes; enforcement; failure of collector to collect and pay over taxes.

"There shall be a lien on real estate for the city taxes assessed thereon from the commencement of the year for which they are assessed. The collector of taxes of said city may distrain and sell therefor in like manner as a sergeant or city treasurer or other collector may distrain and sell for state taxes, and shall have in other respects, like power to enforce the collection of all taxes and assessments properly placed in his hands for collection.

"The council may require the real estate in said city which is delinquent for non-payment of taxes to be sold for the same, with interest thereon and such per centum as it may prescribe for charges and expenses of sale and collection, and may regulate the terms on which real estate may be sold or redeemed; provided, that such sales shall be made after the manner prescribed by general law.

"The council of the city of Danville may provide by ordinance now in force, or hereafter adopted, for the collection of city taxes and levies on real estate and tangible personal property in installments, at such times, with such penalties for delinquent payments, and with such interest at not exceeding the rate of six percentum per annum upon the principal and penalties of all such taxes and levies or installments thereof from the date such taxes or installment thereof respectively become

due, as may from time to time be fixed and prescribed by ordinance.

"Should the collector of the city taxes, or other person designated to receive same, fail to collect and pay over the said taxes at the time prescribed by the council, he and the sureties on his bond given for the faithful discharge of his duties, their executors and administrators, shall be liable therefor and the same may be collected or enforced by motion or action or other remedy prescribed by general law before the corporation court of the city of Danville." (Act of General Assembly of Virginia 1889-90, page 407; same 1940, page 160.)

Sec. 2. Powers to be vested in collectors of revenue; enforcement of taxes against mortgaged property; persons about to remove or dispose of taxed property.

"The council may vest in the collector of city taxes and assessments, the collector of water rates, rents or assessments and any other collector of sums due to the city which it may appoint, any or all of the powers which are now or may be hereafter vested in any collector of state taxes, and may prescribe the mode of his proceeding, and the mode of proceeding against him for failure to perform his duties. No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the possession of the grantor nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for

taxes assessed thereon, no matter in whose possession they may be found. And in the event it is evident that the party or persons owing said taxes, or the person in possession of the goods and chattels upon which said taxes have been assessed, is about to abscond, remove said goods and chattels beyond the jurisdiction of the corporation court of said city, or make way with, or dispose of said goods and chattels, with the design of avoiding the payment of said taxes, then said collector may levy upon or distrain and sell said goods and chattels for the payment of said taxes then due in the same way and with the same effect as he would be authorized to do, on or after the first day of December of the year in which said taxes accrued."

(Acts of General Assembly of Virginia 1889-90, page 407).

CONSTITUTION OF VIRGINIA:

SEC. 171. Segregation of realty and tangible personalty for local taxation; exception.—

"No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or reassessed for local taxation in such manner and at such times as the general assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

THE TAX CODE, CHAPTER 19, Tangible Personal Property, Machinery and Tools, and Merchants' Capital.

Sec. 283. Tangible personal property segregated for local taxation only; classification.— Tangible personal property having been segregated by law for local taxation only, the classification hereunder shall be as follows:

"1. The aggregate number of horses, mules and other kindred animals, and the value thereof.

"2. The number of cattle, and the value thereof.

"3. The number of sheep and goats, and the value thereof.

"4. The number of hogs, and the value thereof.

"5. The aggregate number and value of all automobiles, motor trucks, motorcycles, and all other motor vehicles.

"6. The aggregate value of all animal drawn vehicles and bicycles.

"7. The aggregate value of all farming implements and tools of mechanics.

"8. The aggregate value of all felled timber, ties, poles, cord wood, bark, and other timber products, and all agricultural products, in the hands or possession, legal or constructive, of a purchaser, provided that grain, tobacco and other agricultural products in the hands of a producer of the same are hereby declared exempt from taxation as property under this section.

"9. The aggregate value of all household and kitchen furniture, including gold and silver plates, plated ware, watches and clocks, sewing machines, refrigerators, automatic refrigerating machinery, vacuum cleaners, and all other household machinery, books, firearms and weapons of all kinds.

"10. The aggregate value of all pianos, organs, victrolas, phonographs, and records to be used therewith, and all other musical instruments of whatever kind, radio instruments and equipment.

"11. The aggregate value of all oil paintings, pictures, statuary, curios, articles of virtue and works of art.

"12. The aggregate value of all diamonds, cameos, or other precious stones, and all precious metals as ornaments or jewelry.

"13. The aggregate value of all boats, or water craft under five tons burthen used for business or pleasure.

"14. The aggregate value of all ships, tug boats, barges, boats, or other craft of five tons burthen or over, and all other floating property, not required to be assessed by the State corporation commission, used for business or pleasure, together with their tackle, rigging, furniture, and all else that pertains to them, or of any share or interest therein, though the said boats or other water craft or any one of them, may not be at the time of the assessment in the waters of the State of Virginia.

"15. The aggregate value of all other tangible personal property not herein specifically enumerated, including the value of all seines, pound nets, fykes wires and other devices for catching fish, and the aggregate value of all toll bridges, turnpikes and ferries, except steam ferries owned and operated by a chartered company, and the value of all poles, wires, switchboards, et cetera; telephone or telegraph instruments, apparatus, et cetera, owned by any person, firm, association or company not incorporated.

"No property shall be assessed as tangible personal property which the law classifies as intangible personal property." (Tax bill, § 6; 1910, p. 487; 1924, p. 396.)

Sec. 280. Department of taxation to prescribe and furnish blank forms of returns for reporting property mentioned in this chapter; tax payers to file returns with commissioners of the revenue.—

"Blank forms of returns for reporting the classes of property mentioned in this chapter shall be prescribed by the department of taxation and furnish to the several commissioners of the revenue in ample time for their use. Every taxpayer owning any of the property mentioned in this chapter on January first of any year shall file a return thereof with the commissioner of the revenue for his county or city on the forms so prescribed. Such returns shall be filed on or before June first of each year, except that in the year nineteen hundred and twenty-eight, they may be filed on or before July first. Tangible personal property, machinery and tools, and merchants' capital shall be

returned for taxation as of January first of each year. The status of all persons, firms, corporations and other taxpayers liable to taxation on any of such property shall be fixed as of the date aforesaid in each year, and the value of all such property shall be taken as of such date. Every fiduciary shall file the returns mentioned in this section with the examiner of records having jurisdiction."

CHAPTER 20. Local Levies

Sec. 293. Cities and towns to make city and town levies.—

"The council of every city and town shall annually cause to be made up and entered on their journals an account of all sums lawfully chargeable on the city or town which ought to be paid within one year, and order a city or town levy of so much as in their opinion is necessary to be raised in that way in addition to what may be received for licenses and from other sources. The levy so ordered may be upon the persons in the said city or town above the age of twenty-one years, not exempt by law from the payment of the State capitation tax, and upon any property therein subject to local taxation and not expressly segregated to the State for purposes of State taxation only." (Code 1919, §3073.)

CHAPTER 21. Commissioners of the Revenue.

Sec. 317. Personal property book, form of and what to be entered therein.—

"The department of taxation shall prescribe the

forms of the personal property book to be used by the commissioner of the revenue, and shall furnish each commissioner of the revenue with three copies of blank personal property books prepared in the form so prescribed.

"The personal property book shall be so arranged that personal property owned by white persons shall be assessed with taxes and levies in one part of the book, and personal property owned by colored persons shall be assessed with taxes and levies in another part of the book.

"In making out these books, the commissioner of the revenue shall arrange them alphabetically to show the persons chargeable with taxes with refereince to the first and each subsequent letter of each name, and where there are two or more persons of the same name, he shall use some distinguishing sign by which the taxpayer may be identified. The post office address of each taxpayer shall be given.

"The commissioner of the revenue shall, in making out the original personal property book and the two copies thereof, follow strictly the form prescribed.

"Upon the personal property book shall be entered the name of each person, twenty-one years of age or over, not pensioned by this State for military services, and a State poll tax of one dollar and fifty cents shall be assessed thereon against each such person; and all taxable tangible and intangible personal property and all other subjects of taxation not required by or in pursuance of law to be assessed on some other book or form.

"Nothing herein contained shall be construed as prohibiting the department of taxation from prescribing a separate personal property book for the assessment of State taxes and a separate personal property book for the assessment of local levies.

"All supplemental assessment sheets of every kind prescribed by the department of taxation and used for the assessment of taxes and levies during any current tax year after the regular assessment books have been completed shall be disposed of in the same manner as the regular assessment books were disposed of, and such supplemental sheets shall be the assessment sheets for the assessment of such taxes and levies."

(Code 1919, §2309.)

CHAPTER 24. County and City Treasurers, and the Collection of Taxes.

SEC. 378. What may be distrained for taxes; fees of officers, notice to tenant.—

"Any goods or chattels in the city or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable, or collector. In all cases property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes thereon. Any timber or wood growing on the land belonging to the person or estate assessed with taxes or levies may be distrained and sold, so far as necessary, to pay the amount of such taxes and levies and expense of sale, and shall be sold standing in the manner prescribed for the sale of goods and

chattels, other than horses, mules, and oxen, under distress or levy for taxes; and the purchaser shall have the right to cut and carry away such wood or timber within twelve months after the purchase of the same, with the right of ingress and egress for this purpose, but shall not haul the same over any lands occupied at the time by growing crops. Any real estate in the county or corporation belonging to the person or estate assessed with taxes or levies due on such real estate, may be rented or leased by the treasurer, sheriff, constable, sergeant, or collector, privately or at public outcry; after due publication, in the discretion of such treasurer, sergeant, sheriff, constable, or collector, either at the front door of the courthouse or on the premises, or at some public place in the community where the premises are situated, after giving not less than fifteen days' notice by printed or written notices posted at the front door of the courthouse, and at three or more places in the neighborhood of the real estate to be leased. Such leasing shall be for a term not exceeding one year, and for cash sufficient to pay the taxes or levies due on the real estate so rented, and the costs and charges of advertising and leasing. When a lease is effected, the treasurer, sergeant, collector, sheriff or constable leasing such real estate, shall put the lessee in possession thereof, and for such purpose shall have like powers as those exercised by a sheriff acting under a writ of possession. When the treasurer, constable, sheriff, sergeant, or collector advertises and leases, or advertises without leasing, a parcel of real estate under this section, he shall receive a fee of sixty cents, to be paid as a part of the cost of

this proceeding. The board of supervisors or other governing body of any county may, by resolution adopted by a majority of the members thereof by a recorded yea and nay vote, postpone the time when any real estate in such county may be rented or leased for the taxes and or local levies for any year, until after the fifteenth day of November of the next succeeding year. In all cases where a sheriff, constable, collector, treasurer, sergeant, or other collecting officer, has to levy or distrain and sell, or levy or distrain without selling, he shall receive a fee of sixty cents, to be collected with the taxes. But in no case shall any of these fees be paid by the State. When real estate is advertised for leasing for the taxes and there is any tenant in possession of the property so advertised, then the treasurer, sheriff, sergeant, constable, collector, or other collecting officer making the lease, shall serve upon such tenant, at least five days prior to the day of leasing, a copy of the notice of leasing. This service shall be in conformity with section six thousand and forty-one of the Code of Virginia." (Code 1919, Sec. 2439; 1926, p. 1000; 1934, p. 356.)